No. 261.

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Kensard Plff. in Error
vs.
State of Nebraska

Filed May 16, 1902.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

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Plaintiff in Error,
vs.
THE STATE OF NEBRASKA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

REPLY BRIEF OF PLAINTIFF IN ERROR.

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AND T. S. ALLEN,
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Attorneys for Defendant in Error.

GIBBS-BROOKFIELD PRINTING CO., OMAHA

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ARGUMENT.

In the brief filed in this cause by the defendant in error it is contended that the money paid by the government to the State of Nebraska allowed upon the Pawnee Indian Reservation was not obtained from the government and paid to

the State through the efforts of the plaintiff in error. (Page 5 of brief).

The citation of the record made for the purpose of sustaining this view fails in its object. An examination of the record cited, and Mr. Kennard's testimony—pages 33 to 38 inclusive, printed record, and letter of U. S. Commissioner page 48 printed record, shows conclusively that this money $43,807.42 was obtained for the State directly through the efforts of Mr. Kennard. Furthermore it is shown by the record (pages 38, 39, 51, 52, 59, 60 printed record) that if the State had received 5 per cent of the sales of all the lands of the Pawnee Reservation it would have received the sum of $43,807.42 instead of the sum of $27,043.99; that the failure of the State to receive the remainder of the money claimed to be due was owing to the fact that the Interior Department after Sept. 11, 1886, reversed the decision of the department, which was obtained by Mr. Kennard January 14, 1881, and subsequently refused to pay to the State any more money under such decision.

The last payment made to the State under the decision obtained by Mr. Kennard was September 11, 1886. If the learned counsel for defendant in error are correct in their contention, then in the natural and easy course of events the government should have paid to the state upon account of the Pawnee lands, without the intervention or assistance of any financial agent, the further sum of $16,763.43. If this balance be plainly due to the State of Nebraska, then the legal representatives of the State have neglected a very easy task that has been before them for several years, and by their neglect of performance the Federal Government has, for several years, retained this balance that properly belongs to the State.

This contention of counsel for defendant in error is made in this court for the first time. The record of the proceed-

ings in the State Court fail to show that it was at any time contended by the State, that the money paid to the State on account of the Pawnee Reservation lands was not obtained through the efforts of Mr. Kennard. On the contrary the record shows, that at all times during the course of the proceedings in the State Courts, this question was conceded in favor of Mr. Kennard. The opinion of the State Supreme Court (page 12 printed record) states, "Mr. Kennard entered upon the performance of his contract with the governor, and by his efforts induced the Secretary of the Interior to acknowledge that the United States were indebted to the State of Nebraska in the sum of five per centum of the proceeds of the sale of the Pawnee Indian Reservation lands made by the United States subsequent to the admission of the State into the Union; and in pursuance of this decision of the Secretary of the Interior the United States paid into the treasury of the State $27,000.00."

Recognizing the efforts of Mr. Kennard, and their beneficent results, the State Courts deny his right of recovery of compensation for his services, not upon the ground that he had not earned the amount he claimed, but upon the ground that the money he obtained for the State arose from the sale of PUBLIC LANDS; that the proviso at the conclusion of the act of the legislature authorizing his appointment, "that the foregoing shall in no wise apply to the cash school fund accruing to the State," excluded his employment for this particular purpose, and the question was reduced to whether or not the Pawnee Indian Reservation lands were public lands.

Counsel for Mr. Kennard contend that the object of the resolution of the legislature, authorizing his appointment, was to employ an agent to prosecute the claims of the State for compensation as to all lands named in the resolution that had been placed without the public domain otherwise

than by sale and homestead and similar entries, and that his contract would apply to any lands where the right of the State to its percentage had been denied. The resolution of the legislature describes "Indian Reservations" as a portion of the public domain that had been alienated, and concerning which the employment of a special agent was necessary. Unless the Pawnee Indian Reservation was not an "Indian Reservation" and was PUBLIC LANDS the right of plaintiff in error to recover is plain.

Mr. Kennard in prosecuting the claims of the State, based these claims upon equitable grounds; that the government by alienating the lands, otherwise than by sale, had thereby deprived the State of its five per centum of the proceeds of the sale and should in equity compensate the State for its loss. The amount of compensation was contended to be five per cent of the value of the lands, which value as to the Pawnee Reservation lands should be fixed at the amount actually realized from the sale of the lands, when the same were sold on behalf of the Indians. That the Secretary of the Interior based his allowance as to the Pawnee lands upon legal rather than equitable grounds, could in no way defeat Mr. Kennard's right of compensation.

Neither could the State assume, that, as the Secretary decided that the lands in dispute were public lands, therefore it was relieved from its obligation to pay its attorney for his services. The reasons given by the Secretary for the allowance of the claim could in no wise determine the rights of the parties to this action.

The question to be determined by this court, and which gives the right of a writ of error, is entirely a legal one, and is whether or not, as construed by the Acts of Congress, the Pawnee Indian Reservation lands were public lands.

INDIAN RESERVATIONS AS PUBLIC LANDS.

The conclusions in the opinion of the Supreme Court

of the State of Nebraska, and the brief of the Counsel for Defendant in Error, are based upon the decision in the case of Buttz v. Northern Pacific Railroad Company, 119 U. S. 55, and which is claimed to be decisive of the question of whether or not Indian Reservations are Public Lands within the meaning of the legislative acts of Congress. It is claimed that this case overrules the case of Newhall v. Sawyer, 92 U. S. 763, and Wirth v. Branson, 98 U. S. 118. An examination of the case of Buttz v. Northern Pacific Railroad Company shows that the controversy was between parties who derived their title from a common source, and neither party to the litigation was in a position to deny the title of the United States to the land in controversy. Furthermore, the land in controversy was not located upon any Indian Reservation, and no question of title of any Indian Reservation, or the construction of any treaty with the Indians where any lands were set aside as a reservation arose. The land in controversy in that case was located in what is termed by the courts as "Indian Country," it being land in territory that was occupied by the Indians in their wild and native state, and the only title held by the Indians was such title as has been recognized by the government to be held by all peaceably inclined Indians to lands in their possession and occupancy and used for the purposes of chase, and the production of such sustenance as was employed by them in their native or savage condition.

It has always been recognized by the government that peaceable tribes of Indians who held possession and occupancy of certain lands had a right or interest in such lands so far as they made use of the same in their native state and condition. The policy of the United States with reference to the Indian tribes and their rights to the lands found in their possession and occupancy, has been to recognize the fact that equity, justice and fair treatment demanded that

the use of said lands by such tribes in their savage state constituted in a certain sense a property right, of which they should not be divested without just compensation. This interest has been divested by a series of treaties with the different friendly tribes in which these tribes have been regarded as quasi foreign nations.

Johnson v. McIntosh, 8 Wheat. 574;
The Cherokee Tobacco, 11 Wall. 616.

The compensation received by the Indians, provided for in these treaties, has been in the way of cash payments, provisions for the education and civilization of the tribes treated with, and the setting apart of reservations for such tribes, in which the government relinquished to such tribes the fee title of such reservations for all civilized purposes and which included all the right, title and interest that the government had to convey in such lands, and thereafter the United States had no interest in such reservations, except such interest as was specifically reserved in the treaties.

The ownership of the United States was considered to have been acquired by the right of discovery, and included the full right and title in fee simple for all civilized purposes, subject only to such usage as the savage or Indian tribes had previously put upon such lands. The dominion of the discoverer was considered complete, except as against such rights of the In ians, and no one except the sovereign or discoverer could acquire any further or greater right to any portion of the country, than that originally held by the Indians.

This theory and the application of it was to only such Indian tribes as were friendly, and it was not applicable in cases of conquest. The title by conquest as against the Indians, was acquired and maintained by force, and the conquerer dictated to the subdued Indian tribes the terms of

peace and did not recognize the right of the conquered Indians to any possession or occupancy of any lands.

The leading case upon the question of the extent of the original title of the Indians and the title acquired by the discoverer or conquerer, is Johnson v. McIntosh, 8 Wheat. 543, where the question is elaborately and very ably discussed by Chief Justice Marshall, since which time, 1823, the views expressed in that opinion have been the law of the land.

The case of Buttz v. the Northern Pacific Railroad Company is in strict accordance with the opinion of Justice Marshall, and refers only to the original right of occupancy by the Indians. The court in its opinion states, (quoting from 13 Pet. 201):

"The ultimate fee, encumbered with the Indian right of occupancy, was in the crown previous to the Revolution, and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power and respected by the courts until extinguished, when the patentee took the unincumbered fee."

The court further states,

"Nearly all the lands in the territory of Dakota, and indeed, a large, if not the greater, portion of the land along the entire route to Puget Sound on which the road of the company was to be constructed was subject to this right of occupancy by the Indians. With knowledge of their title, and its impediment to the use of the lands by the company, Congress made the grant, with a stipulation to extend the title."

It will clearly be seen that the title of the Indians referred to in the Buttz case was simply the title arising from the occupancy by the Indians, and not the title that was trans-

ferred to the Indians for the purposes of civilization by way of an Indian reservation.

In the case at bar the treaty with the Pawnee Indians was fully as broad as other treaties that have been construed by the courts as conveying to the Indians absolute ownership. The terms of the treaty provided for the civilization and education of the Indians and the use of the reservation lands for civilized purposes, including tillage and general cultivation of the soil. The grant to the Indians would in no way be defeated by the fact that the grant was made to the tribe as a community and not in severalty. The ownership would be as complete in the community as it would in severalty. These lands were never subsequently opened for settlement, except to purchasers who bought the lands and paid the purchase money to the government as trustee for the Indians. The United States after the treaty of 1857 retained no interest in this reservation except for the special purposes mentioned in the treaty, such reservation being the use of the land for the purpose of forts, military posts and roads. Without violating the terms of the treaty with the Pawnees the government could not afterwards assert any ownership in the reservation lands except for military purposes, and it could not subsequently convey to the State of Nebraska any interest in such lands, and could not return them to the public domain without the consent of the Indians, and such Indian reservation was consequently not public lands.

In further support of our contention we cite California and Oregon Land Co. v. Worden, 85 Fed. 94; Martin v. Lessees of Waddell, 16 Peters 367. All of which we respectfully submit.

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